STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

******

MAKENZIE GREER, Minor,
KENNETH GREER, Individually and
as Conservator for MAKENZIE
GREER, and ELIZABETH GREER,

Plaintiffs/Appellees/
Cross-Appellants,

vs

ADVANTAGE HEALTH and
ANITA R. AVERY, MD,
Jointly and Severally,

Defendants/Appellants/
Cross-Appellees,

and

TRINITY HEALTH-MICHIGAN,
d/b/a ST. MARY'S HOSPITAL, and
KRISTINA MIXER, MD,

Defendants.
_____/

SUPREME CT DOCKET NO:
149494

CT OF APPS DOCKET NO:
312655

KENT CO CIR CT FILE NO:
10-09033-NH

BRIEF ON APPEAL OF APPELLEES GREER

ORAL ARGUMENT REQUESTED

William J. Waddell (P21879)
LAW OFFICES OF WILLIAM J. WADDELL
6000 Grand River Dr NE
Ada, MI 49301
(616) 957-5800
Atty for Plaintiffs/Appellees/Cross-Appellants Greer
_____/

Jonathan S. Damon (P23038)
JONATHAN SHOVE DAMON
Attorney and Counselor

77 Monroe Center NW, Ste. 303
Grand Rapids, MI 49503
(616) 456-6005
Co-counsel for Plaintiffs/Appellees/Cross-Appellants Greer
_____/

Steven C. Berry (P26398)
BERRY & BERRY, PLC
170 College, Ste. 320
Holland, MI 49423
(616) 796-9600
Atty for Defendants/Appellants/Cross-Appellees
Advantage Health and Avery

Stephanie C. Hoffer (P71536)
SMITH, HAUGHEY, RICE & ROEGGE
100 Monroe Center NW
Grand Rapids, MI 49503
(616) 774-8000
Atty for Amicus Curiae Michigan
Professional Insurance Exchange

Joanne Geha Swanson (P33594)
KERR, RUSSELL AND WEBER PLC
500 Woodward Ave, Ste. 2500
Detroit, MI 48226
(313) 961-0200
Atty for Atty for Amicus Curiae Michigan
State Medical Society

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DID THE TRIAL COURT ERR IN RULING THAT ADVANTAGE HEALTH AND DR. ANITA R. AVERY, MD WERE NOT ENTITLED TO A REDUCTION IN THE MEDICAL DAMAGES AWARDED MAKENZIE GREER UNDER THE COLLATERAL SOURCE STATUTE, MCL 600.6303?

Plaintiffs/Appellees Greer Greer say no

Defendants/Appellants Advantage Health and Dr. Avery say yes

Trial court said no

Court of Appeals said no

STATEMENT OF JURISDICTION

The decision of the Court of Appeals from which Advantage Health and Dr. Anita R. Avery, MD sought leave to appeal was released on May 13, 2014. The application for leave to appeal filed by Advantage Health and Dr. Avery was timely filed within 42 days thereof, on June 17, 2014. The application for leave to appeal as cross-appellants filed on behalf of the Greers was timely, having been filed within 28 days thereof. MCR 7.302(D)(2). This court granted leave to appeal to both appellants Advantage Health and Avery and cross-appellants Greer in an order of December 10, 2014.

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WILLIAM J. WADDELL (P21879)
JONATHAN S. DAMON (P23038)
Attys for Plaintiffs/Appellees/Cross-Appellants Greer

STEVEN C. BERRY (26398)
Atty for Defendants/Apellants/Cross-Appellees Advantage Health/Anita Avery

STEPHANIE C. HOFFER (P71536)
Atty for Amicus Curiae Michigan
Professional Insurance Exchange

JOANNE GEHA SWANSON (P33594)
Atty for Amicus Curiae Michigan
State Medical Society

STATEMENT OF PROCEEDINGS AND FACTS

This is a medical malpractice action. On September 7, 2010 plaintiffs Kenneth Greer, Individually and as Conservator for Makenzie Greer, a minor, and Elizabeth Greer Individually filed the present complaint. [X-App Greer Appendix, p 13a; App Avery Appendix, pp 1a-11a]. The complaint was filed against four health care providers: Advantage Health; Dr. Anita R. Avery, MD; Trinity Health-Michigan, d/b/a St. Mary's Hospital; and Dr. Kristina Mixer, MD. Liability was to be imposed jointly and severally, and arose out of the devastating, negligently performed delivery of Mr. and Mrs. Greer's daughter Makenzie on September 28, 2008. [Complaint, ¶¶ 4, 19, 24, 39].

Mr. Greer, acting as Conservator for his daughter, sought damages for the injuries sustained by Makenzie, which included hypoxic brain injury, respiratory depression, metabolic acidosis, permanent and irreversible brain damage, and blindness. [Complaint, ¶¶ 24, 39].

Mr. Greer, Individually and as Conservator for Makenzie, made claim for medical expenses incurred for treatment of Makenzie. [Complaint, ¶ 41].

Mrs. Greer made claim for personal injuries she herself sustained as a result of the botched delivery, including a uterine rupture, urethral injury, disfigurement and scarring. [Complaint, ¶¶ 24, 43]. And Mr. Greer sought damages for loss of consortium for the injuries sustained by his wife. [Complaint, ¶ 42].

Discovery, as well as the normal procedures attendant in a complicated medical malpractice case, ensued. Eventually the Greers and St. Mary's Hospital entered into a confidential settlement. That settlement was for $600,000.00 for all claims brought by the

Greers. [App Avery Appendix, pp 17a-19a; X-App Greer Appendix, pp 23a-25a]. (Dr. Mixer had been dismissed, without prejudice, in an earlier Stipulation and Order of Dismissal. [X-App Greer Appendix, p 11a]).

Once St. Mary's had completed its settlement and been dismissed pursuant to orders approving the settlement and dismissing the action as to it [X-App Greer Appendix, pp 23a-25a; App Avery Appendix, pp 20a-22a], the case continued against Advantage Health and Dr. Avery. Trial began before Kent County Circuit Court Judge the Hon James Robert Redford on April 17, 2012 and continued until the jury returned its verdict on April 27, 2012. [X-App Greer Appendix, pp 30a-34a]. The jury found no cause for action as to the individual claims of Mr. and Mrs. Greer [X-App Greer Appendix, pp 32a-33a] but found in favor of Makenzie and awarded her substantial damages. [X-App Greer Appendix, pp 33a-34a; 35a-39a].

Various post-trial motions were filed by both parties, two of which are now before this court. Advantage Health and Dr. Avery first argued that the entirety of the $600,000.00 settlement the Greers reached with St. Mary's should be set-off from the award to Makenzie. Advantage Health and Dr. Avery also argued that the judgment should be reduced by the difference between the stipulated medical expenses incurred on behalf of Makenzie and the amount of liens claimed by the health plans/insurers providing coverage for her. Following briefing and argument, Judge Redford issued a seven page Opinion and Order on August 8, 2012, first holding that the set-off from the settlement with St. Mary's Hospital would be in the sum of $162,058.11, which he determined was that portion of the settlement paid by St. Mary's in exchange for releasing liability for Makenzie's injuries. [App Avery Appendix, pp 78a-81a]. Judge Redford also ruled that the difference between the medical expenses incurred and the liens

claimed would not be set-off, as payment by the health plans/insurers did not constitute a "collateral source" under MCL 600.6303. [App Avery Appendix, p 77a].

On August 28, 2012, Dr. Avery and Advantage Health filed a motion for reconsideration [X-App Greer Appendix, p 2a], which was denied in an Opinion and Order of September 12, 2012. [App Avery Appendix, pp 82a-86a]. Accordingly on September 14, 2012, the court entered its Order For Judgment in favor of Kenneth Greer, Conservator for Makenzie Greer against defendants Anita R. Avery, MD and Advantage Health, jointly and severally, in the sum of $1,058,825.56 plus taxed costs [App Avery Appendix, pp 87a-88a], and entered an order taxing costs against Advantage Health and Dr. Avery in the sum of $32,393.80. [X-App Greer Appendix, p 1a]. Advantage Health and Dr. Avery timely filed an appeal of right with the Court of Appeals.

In a published opinion of May 13, 2014, *Greer v Advantage Health*, 305 Mich App 192; 852 NW2d 198 (2014), the Court of Appeals affirmed in part and reversed in part. The court ruled that the full $600,000.00 settlement received by all three Greers to compensate them for their individual claims, not just the amount of the settlement apportioned to Makenzie, was to be set off against Makenzie's recovery. That issue is before this court in the Greers' cross-appeal, and the Greers have already filed their brief on that issue.

The Court of Appeals affirmed Judge Redford's ruling that damages for medical expenses awarded Makenzie were not to be reduced, in whole or in part, because of liens asserted by the health insurers/plans. That ruling, and the Court of Appeals' affirmance thereof, is the subject of the appeal filed on behalf of Advantage Health and Dr. Avery. This brief responds to their appeal.

ISSUE AND DISCUSSION

DID THE TRIAL COURT ERR IN RULING THAT ADVANTAGE HEALTH AND DR. ANITA R. AVERY, MD WERE NOT ENTITLED TO A REDUCTION IN THE MEDICAL DAMAGES AWARDED MAKENZIE GREER UNDER THE COLLATERAL SOURCE STATUTE, MCL 600.6303?

A. STANDARD OF REVIEW.

Advantage Health and Dr. Avery correctly note that this court reviews the interpretation of statutes *de novo*.

B. THE TRIAL COURT AND COURT OF APPEALS CORRECTLY HELD THAT THE DAMAGES AWARDED MAKENZIE GREER FOR MEDICAL EXPENSES WERE NOT TO BE REDUCED UNDER THE COLLATERAL SOURCE STATUTE, MCL 600.6303.

Advantage Health and Dr. Avery make but one argument to this court – that the difference between the medical expenses charged for Makenzie's care and the amounts paid by health insurers/plans, for which a lien was claimed by the insurers/plans, constitutes a "collateral source" which should be set off from Makenzie's recovery under MCL 600.6303. This issue, and only this issue, was preserved below. Thus a number of arguments raised, particularly by Amicus Curiae Michigan Professional Insurance Exchange, are simply inapposite and indeed, in conflict with the stipulation made below by Advantage Health and Dr. Avery.

On April 17, 2012, the first day of trial, a number of exhibits were marked and admitted. Specifically, plaintiffs' Exhibits 1-31 and defendants' Exhibits A-N were marked [A'ee Greer Appendix, p 2b], and all were admitted by agreement of counsel. [A'ee Greer Appendix, p 3b].

Eight days after these exhibits were admitted by agreement a stipulation was placed on the record:

> "MR. WADDELL: Thank you, Your Honor. The parties have agreed that if there's a finding for plaintiffs, that Elizabeth Greer's medical bills to date are $31,023.33.

> Makenzie's medical bills, as of August of 2011, we don't have update since that, are $425,533.75. Mr. Berry will stipulate that those are the amounts for the jury, at least through August of 11, but would like the record to reflect that in the event there is a plaintiff's verdict and those amounts are awarded, the Court can consider on brief and argument later whether those gross amounts should be offset by any collateral sources or lien amounts which are less, and there is authority on that, but neither one of us are prepared to argue it today.
> THE COURT: Okay.
> MR. BERRY: That's correct. What I am stipulating to is those are the amounts of the medical bills, but that - - but I am reserving the right and my position is that the plaintiffs are entitled to recover only the medical expenses for which there is a claimed lien, nothing beyond that.
> THE COURT: Okay. I understand your position.
> MR. BERRY: Which can be subject to a post trial motion." [Appendix of Appellants/Cross-Appellees Advantage Health/Avery, page 24a].

The jury, having found that Makenzie's injuries resulted from the malpractice of Dr. Avery, awarded her those stipulated damages. [X-App Greer Appendix, p 36a].

On June 7, 2012, a hearing was held on cross-motions for post verdict relief. [A'ee Greer Appendix, pp 4b-8b]. The first issue presented was that which is now before this court -- application of the collateral source statute. Counsel for Advantage Health and Dr. Avery reiterated their position:

> "So our position is, even under the *Zdrojewski* case, the maximum past non-economic - - past economic damages for medical expenses that are awardable in this case is a total of $227,687. The *Zdrojewski* case dealt with a situation where the amount of the lien claimed was less than the amount of the medical expenses paid. In this situation, likewise, the amount of the lien claimed is less than the amount of the medical expenses paid. But the total medical expense bill, to which I stipulated to the amount, reserving the right to make this very argument, the health care providers accepted in full payment, not the $425,000 that was awarded, but the sum of $227,000.
> So we're asking, number one, that the verdict amount be reduced to $227,687, the amount that was actually paid and accepted as full payment." [A'ee Greer Appendix, pp 7b-8b].

Judge Redford rejected this argument succinctly in his opinion and order of August 8, 2012 regarding the post-verdict motions, stating:

> REDUCTION OF ECONOMIC DAMAGES PURSUANT TO MCL 600.6303
> With respect to the award of past and future economic damages, the Court is satisfied that no reduction is warranted. MCL 600.6303(4) provides in pertinent part:
>
> > ... Collateral source does not include benefits paid or payable by a person, partnership, association, corporation, or other legal entity entitled by contract to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages, if the contractual lien has been exercised pursuant to subsection (3).
>
> The Court of Appeals, in interpreting this statute in a similar context to the instant case, has declined to reduce a jury's past medical expenses award because the insurers exercised liens and thus the insurance benefits did not constitute a collateral source. See *Zdrojewski v Murphy*, 254 Mich, App 50; 657 NW2d 721 (2002). Therefore, the Court is satisfied that the collateral source rule does not encompass a situation, such as is found in the instant case, in which a lien holder exercises a lien. All payments made by Aetna and Priority Health are subject to asserted liens. Wherefore the statutory collateral source set off rule no longer applies to this case and no reduction in the Jury award is warranted." [App Avery Appendix, p 77a].

The Court of Appeals discussed in some detail the argument raised by Advantage Health and Dr. Avery, *Greer v Advantage Health*, 305 Mich App 192, 206-213; 852 NW2d 198 (2014), and ultimately rejected the argument, concluding, at 212-213:

> "In sum, we affirm the trial court's ruling regarding collateral source payments under MCL 600.6303. Although we find that an insurance discount is a 'collateral source' by which plaintiffs' medical expenses were "paid or payable" and that such a discount is a benefit "received or receivable from an insurance policy," the plain terms of the exclusion from the statutory collateral source rule of § 6303(4) when a contractual lien is exercised is not limited to the amount of the lien; it applies to all benefits that were paid or payable by a 'legal entity entitled by contract to a lien.'"

Under the common law collateral source rule, insurance proceeds could not be set off against a plaintiff's recovery. As noted in *Tebo v Havlik*, 418 Mich 350, 366; 343 NW2d 181 (1984):

> "The common-law collateral-source rule provides that the recovery of damages from a tortfeasor is not reduced by the plaintiff's receipt of money in compensation for his injuries from other sources. *Motts v. Michigan Cab Co.*, 274 Mich. 437, 264 N.W. 855 (1936); *Perrott v. Shearer*, 17 Mich. 48 (1868). In the context of insurance, the rationale for the rule is that the plaintiff has given up consideration and is entitled to the contractual benefits. The plaintiff's foresight and financial sacrifice should not inure to the benefit of the tortfeasor, who has contributed nothing to the plaintiff's insurance coverage. Similarly, gratuitous compensation should not inure to the benefit of the tortfeasor. The tortfeasor has contributed nothing, except the activity which caused the plaintiff's injuries."

Thus under the common law Advantage Health and Dr. Avery would be responsible for all medical expenses charged for the treatment of Makenzie, whether insurance paid for them or not. The argument made by Advantage Health and Dr. Avery, and apparently concurred in by Amicus Curiae Michigan Professional Insurance Exchange, that the common law collateral source rule was simply an evidentiary rule, not applying to the actual damages recoverable by the injured person, is simply wrong. The rule precluded admission of evidence of payment of medical expenses, and entitled the injured person to an award of those medical expenses, whether they were paid for or not.

1986 Public Act 178 was a legislative modification of this common law rule. MCL 600.6303 was enacted, a statute which states, in its entirety:

> "(1) In a personal injury action in which the plaintiff seeks to recover for the expense of medical care, rehabilitation services, loss of earnings, loss of earning capacity, or other economic loss, evidence to establish that the expense or loss was paid or is payable, in whole or in part, by a collateral source shall be

admissible to the court in which the action was brought after a verdict for the plaintiff and before a judgment is entered on the verdict. Subject to subsection (5), if the court determines that all or part of the plaintiff's expense or loss has been paid or is payable by a collateral source, the court shall reduce that portion of the judgment which represents damages paid or payable by a collateral source by an amount equal to the sum determined pursuant to subsection (2). This reduction shall not exceed the amount of the judgment for economic loss or that portion of the verdict which represents damages paid or payable by a collateral source.

(2) The court shall determine the amount of the plaintiff's expense or loss which has been paid or is payable by a collateral source. Except for premiums on insurance which is required by law, that amount shall then be reduced by a sum equal to the premiums, or that portion of the premiums paid for the particular benefit by the plaintiff or the plaintiff's family or incurred by the plaintiff's employer on behalf of the plaintiff in securing the benefits received or receivable from the collateral source.

(3) Within 10 days after a verdict for the plaintiff, plaintiff's attorney shall send notice of the verdict by registered mail to all persons entitled by contract to a lien against the proceeds of plaintiff's recovery. If a contractual lien holder does not exercise the lien holder's right of subrogation within 20 days after receipt of the notice of the verdict, the lien holder shall lose the right of subrogation. This subsection shall only apply to contracts executed or renewed on or after the effective date of this section.

(4) As used in this section, "collateral source" means benefits received or receivable from an insurance policy; benefits payable pursuant to a contract with a health care corporation, dental care corporation, or health maintenance organization; employee benefits; social security benefits; worker's compensation benefits; or medicare benefits. Collateral source does not include life insurance benefits or benefits paid by a person, partnership, association, corporation, or other legal entity entitled by law to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages. Collateral source does not include benefits paid or payable by a person, partnership, association, corporation, or other legal entity entitled by contract to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages,

> if the contractual lien has been exercised pursuant to subsection (3).
>
> (5) For purposes of this section, benefits from a collateral source shall not be considered payable or receivable unless the court makes a determination that there is a previously existing contractual or statutory obligation on the part of the collateral source to pay the benefits."

In *People v Schaefer*, 473 Mich 418, 430-431; 703 NW2d 774 (2005), this court succinctly set out principles for interpreting statutes:

> "When interpreting a statute, it is the court's duty to give effect to the intent of the Legislature as expressed in the actual language used in the statute. It is the role of the judiciary to interpret, not write, the law. If the statutory language is clear and unambiguous, the statute is enforced as written. Judicial construction is neither necessary nor permitted because it is presumed that the Legislature intended the clear meaning it expressed." [Fns omitted]

The collateral source statute, MCL 600.6303, is contrary to the common law collateral source rule in certain circumstances, particularly where the insurer or health plan which pays medical expenses does not claim a lien. In such circumstance the insurer's/plan's payments are a set-off from the injured person's recovery.

Where a statute and the common law conflict, the statute must be narrowly construed or, as was stated in *Velez v Tuma*, 492 Mich 1, 11-12; 821 NW2d 432 (2012):

> "The common law remains in force until 'changed, amended or repealed.' Whether the Legislature has abrogated, amended, or preempted the common law is a question of legislative intent. We will not lightly presume that the Legislature has abrogated the common law. Nor will we will extend a statute by implication to abrogate established rules of common law. 'Rather, the Legislature ""should speak in no uncertain terms"" when it exercises its authority to modify the common law." [Fns omitted]

See also *Nation v W.D.E. Electric Co*, 454 Mich 489, 494-495; 563 NW2d 233 (1997):

> "In resolving disputed interpretations of statutory language, it is the function of a reviewing court to effectuate the legislative intent. *Hiltz v. Phil's Quality Market*, 417 Mich. 335, 343, 337 N.W.2d 237 (1983). If the language used is clear, then the Legislature must have intended the meaning it has plainly expressed, and the statute must be enforced as written. *Id.* Section 6306 is silent with regard to the kind of interest rate to be employed. However, the Legislature is deemed to act with an understanding of common law in existence before the legislation was enacted. *Nummer v. Treasury Dep't*, 448 Mich. 534, 544, 533 N.W.2d 250 (1995); *Garwols v. Bankers Trust Co.*, 251 Mich. 420, 424–425, 232 N.W. 239 (1930). Moreover, 'statutes in derogation of the common law must be strictly construed, and will not be extended by implication to abrogate established rules of common law.' *Rusinek v. Schultz, Snyder & Steele Lumber Co.*, 411 Mich. 502, 508, 309 N.W.2d 163 (1981). In other words, '[w]here there is doubt regarding the meaning of such a statute, it is to be 'given the effect which makes the least rather than the most change in the common law.' '*Energetics, Ltd. v. Whitmill*, 442 Mich. 38, 51, 497 N.W.2d 497 (1993). 'This Court will presume that the Legislature of this state is familiar with the principles of statutory construction.' *People v. Hall*, 391 Mich. 175, 190, 215 N.W.2d 166 (1974)."

Advantage Health and Dr. Avery, as well as Amicus Curiae, appear to base their primary argument on the contention that the difference between the amounts charged for Makenzie's care and the amounts actually paid by the health plans/insurers, the negotiated "discount", was a "benefit received" by the Greers. Thus at page 10 of their brief, Advantage Health and Dr. Avery state:

> "This discount ($212,819.00) was clearly an insurance 'benefit received' by the Greers. It was an advantage the Greers received by virtue of the agreement between their health insurers and their health care providers."

This assertion, however, is clearly incorrect. The advantage was not one received by the Greers, but rather an advantage received by the health insurers/plans. It was they, not the Greers, who negotiated the discounted payments to the health care providers. And it was the health insurers/plans which benefited from the discount which they had negotiated. The "discount" was

simply incorporated into the insurers/plans contractual obligations to pay for Makenzie's medical expenses. By arguing that the discount is a separate and distinct entity, different from the actual payments made by the insurers/plans, Advantage Health and Dr. Avery create a straw man, an artificiality which they contend is totally distinct from the amounts actually paid. Nowhere in the statute is any such distinction made.

The definition of "collateral source" is found in MCL 600.6303(4). In pertinent part it includes "benefits received or receivable from an insurance policy; benefits payable pursuant to a contract with a health care corporation, dental care corporation, or health maintenance organization." The "benefits" must be received or receivable by the injured party-plaintiff, since it is from that person's damages collateral sources might be set off.

The last sentence of that subsection states:

> "Collateral source does not include benefits paid or payable by a person, partnership, association, corporation, or other legal entity entitled by contract to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages, if the contractual lien has been exercised pursuant to subsection (3)."

Again, the "benefits" referred to clearly are those received by the injured person and, as noted above, the "discount" was received not by the Greers, but by the health insurers/plans.

In this case liens were indeed imposed upon Makenzie's recovery by the health plans/insurers and the clear and unambiguous language of MCL 600.6303(4) therefore precludes application of the collateral source statute, as held both by Judge Redford and the Court of Appeals.

As page 13 of their brief Advantage Health and Dr. Avery contend that the result reached by the trial court and the Court of Appeals is "absurd". This argument itself is "absurd", for the

statute is but a partial modification of the common law collateral source rule. The result of the lower courts is no more absurd than the longstanding common law collateral source rule itself.

Advantage Health and Dr. Avery refer to several out-of-state decisions at pages 13-14 of their brief. Strangely, in so doing they claim that the jurisdictions involved had "similar collateral source statutes". This is an unfortunate misstatement, for in none of the statutes interpreted by those courts was there a provision excepting from the definition of collateral source one in which a lien is claimed. Thus in *Swanson v Brewster* 784 NW2d 264 (Minn S Ct, 2010), the collateral source statute, Minn Stat §548.251(1) contains no language removing from the collateral source definition a payment for which a lien is asserted. To the same effect, Idaho Code §6-1606, involved in *Dyet v McKinley*, 139 Idaho 526; 81 P3d 1236 (2003) and McKinney's CPLR §4545, applied in *Kastik v U-Haul Co of Western Michigan*, 740 NYS2d 167; 292 AD2d 797 (2002) likewise contain no language regarding the assertion of liens. Yet Michigan's statute expressly removes from the definition of a collateral source benefits paid or payable by an entity entitled to a contractual lien where that lien has been exercised, and it is undisputed that contractual liens were indeed exercised in this case.

Advantage Health and Dr. Avery also refer to a Senate Report as support for their interpretation of the statute. [App Avery Appendix, pp 101a-106a]. For several reasons that reference is of no help to them. As noted in *Frank W. Lynch v Flex Technologies*, 463 Mich 578, 587; 624 NW2d 180 (2001):

> "[I]n Michigan, a legislative analysis is a feeble indicator of legislative intent and is therefore a generally unpersuasive tool of statutory construction." [fn omitted].

See also *People v Gardner*, 482 Mich 41, 57-58; 753 NW2d 78 (2008), and particularly footnote 18 quoting United States Supreme Court Justice Anthony Scalia; and *In re Certified Question*, 468 Mich 109, 115; 659 NW2d 597 (2003), fn 5, last paragraph:

> "Finally, it bears repeating that resort to legislative history of any form is proper *only* where a genuine ambiguity exists in the statute. Legislative history cannot be used to create an ambiguity where one does not otherwise exist." [Emphasis added by court].

Certainly one cannot reasonably argue that the definition of collateral source is "ambiguous" as that term has been defined by this court:

> "[A] provision of the law is ambiguous only if it 'irreconcilably conflict[s]' with another provision, ... or when it is *equally* susceptible to more than a single meaning." [*Mayor of Lansing v Michigan Public Service Commission*, 470 Mich 154, 166; 680 NW2d 840 (2004) [citation omitted; emphasis added by court].

See also *Township of Casco v Secretary of State*, 472 Mich 566, 591; 701 NW2d 102 (2005).

Just as important, missing entirely from the Senate Report and the language of the statue is any connection – the report nowhere refers to specific statutory language. There is nothing, therefore, to show that the report actually resulted in enactment of MCL 600.6303 as worded. Without that connection, the report is useless.

Strangely, in several places Advantage Health and Dr. Avery refer to the Court of Appeals decision in *Heinz v Chicago Road*, 216 Mich App 289; 549 NW2d 47 (1996). That citation actually supports the position of the Greers, however, for as was stated by the court, at 296-297:

> "We find that the second sentence of subsection 4 is an exception to the first: worker's compensation is a collateral source so that a plaintiff's recovery, and a defendant's responsibility to pay damages, are diminished unless there is a valid lien with respect to the plaintiff's recovery. In the latter case, the plaintiff is entitled to, and the defendant must pay, the full amount of the jury verdict because the plaintiff's recovery is subject to the valid lien. In either

> circumstance, the plaintiff's recovery would be identical, and double recovery would be avoided." [Emphasis added].

Finally, a few words about the Amicus Curiae brief filed by Michigan Professional Insurance Exchange. Much of its brief deals with issues which are not before the court and arguments which were not raised below. These would include the definition of "incurred" in the no-fault field, a claim that under the common law actual payment of medical expenses is required before such damages can be recovered (!), and how one proves medical damages. In light of the stipulation described above, the fact that the only issue preserved is that discussed above, and, for that matter, the brief filed by Advantage Health/Dr. Avery, these arguments should be ignored. The argument that actual payment is required before one can recover medical expenses in a tort lawsuit is wholly unsupported. The cases cited in the amicus brief at pages 9-10 simply do not support that contention. *Foley v Detroit & M Ry*, 193 Mich 233; 159 NW2d 506 (1916) and *Kinney v Folkerts*, 78 Mich 687; 44 NW2d 152 (1889) merely considered instructions allowing the jury to award damages for amounts actually paid in medical expense. Nowhere, however, is there even an intimation that one must pay the expense before recovery can be had. *Alt v Konkle*, 237 Mich 264, 211 NW 661 (1927) certainly does not support the argument by amicus, for as was there stated, at 270:

> "A plaintiff may show, in these cases, the sums actually paid or to be paid, but to recover such sums he should adduce evidence that the same are reasonable in amount and that the expenditures were necessary, for he may recover no more than the reasonable value of such of the same as were necessary. If the medical service, etc., have not been paid for and liability therefor has not been determined by account stated, or otherwise, and if the same have been furnished under circumstances entitling plaintiff to recover therefor, he may show reasonable value and recover for such of the same as were necessary. To discuss generally the kind and character of evidence required in respect to such expenditures, especially for medical and surgical care, is beyond the needs of this opinion."

See also *Lacas v Detroit City Ry*, 92 Mich 412, 416-417; 52 NW 745 (1892):

> "The plaintiff is a married woman, and was permitted to recover the expenses of her sickness incurred by and charged to her, but not paid at the time of the trial. It appeared that credit had been extended to her solely. Under these circumstances, she became liable to pay for her services. Meads v. Martin, 84 Mich. 306, 47 N. W. Rep. 583; Hirshfield v. Waldron, 83 Mich. 116, 47 N. W. Rep. 239. The expenses having been incurred on her own account, it is, of course, immaterial that the bill had not been actually paid when suit was instituted."

See also *Bolthouse v DeSpelder*, 181 Mich 153, 163; 147 NW 589 (1914) and cases.

The discussion of the no-fault act in the brief filed by the amicus likewise has no bearing on the present case. The no-fault act is, of course, a fully incorporated, statutory payment scheme. The present case, however, deals with common law tort law, as modified, if at all, by a single statute, MCL 600.6303. Had the Legislature felt that the rationale of *Bombalski v Auto Club*, 247 Mich App 536; 637 NW2d 251 (2001) and the no-fault act should be applied to tort claims generally, it could have done so, but it did not. After all, the Legislature is presumed to know how this court and the Court of Appeals rule, and certainly is able to legislate in accordance therewith. See *Gordon Sel-Way v Spence Brothers*, 438 Mich 488, 505-506; 475 NW2d 704 (1991) and cases cited.

Additional foreign cases are cited by the amicus, but again there is no reason to do so since we deal solely with Michigan law, a very specific Michigan statute.

Finally, it is unknown why amicus spends so much time in its brief detailing how one might prove medical damages. As noted above, those damages were stipulated to by the defendants.

The argument by Advantage Health and Dr. Avery, and for that matter Amicus Curiae, can be reduced to a simple wish on their part, that the last sentence in the statute's definition of collateral source would read as follows:

> "Collateral source does not include benefits paid or payable by a person, partnership, association, corporation, or other legal entity entitled by contract to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages, if the contractual lien has been exercised pursuant to subsection (3), *to the extent of that lien.*"

Whether this additional language is or is not desirable can be debated, but that debate should not be in this court, but rather in the Legislature. As this court has so often counseled when policy arguments are made in contending for a particular interpretation of a statute, "It is for the Legislature, not for the courts," to consider those arguments. See *Sloman v Bender*, 189 Mich 258, 265; 155 NW 581 (1915); *Piper v Pettibone Corp*, 450 Mich 565, 571; 542 NW2d 269 (1995); *People v Hardy*, 494 Mich 430, 444, fn 38; 835 NW2d 340 (2013). Should the defendants and amicus wish the statute to read as they contend, they should bring that request, and any arguments which might support it, to the Legislature. As has so often been held, it is not within this court's province to rewrite a statute.

RELIEF REQUESTED

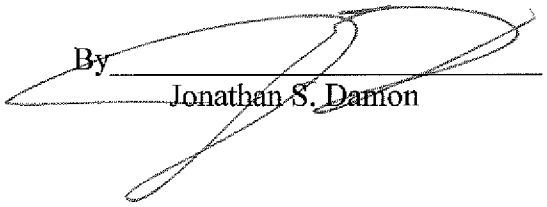
For the reasons expressed above it is requested by plaintiffs/appellees/cross-appellants Greer that the ruling by Judge Redford and the Court of Appeals, that no set off was to be made

from Makenzie Greer's recovery under MCL 600.6303, be affirmed. The Greers also request that they be accorded the relief sought in their cross-appeal.

DATE: February 13, 2015

Respectfully submitted,

JONATHAN SHOVE DAMON
Attorney and Counselor



By _____
Jonathan S. Damon